CONFLICT OF LAWS. — SUBSTANCE OR OBLIGATION OF CONTRACT DISTINGUISHED FROM REMEDY.

ONE of the most puzzling of the many difficult points that beset the student of the Conflict of Laws is that of determining whether a particular question forms part of the substance or obligation of a contract, to be governed by the *lex loci*, or whether it is one of remedy merely, to be controlled by the *lex fori*. Frequently the two draw so close together that it becomes an intricate problem to ascertain whether the *lex loci* or the *lex fori* should be applied.

The purpose of this article is to propose a test by the application of which such problems may be solved, though no attempt will be here made to discuss the principles which determine what is the proper *lex loci* in a given case.

The substance or obligation of a contract embraces all the rights and liabilities that result expressly or impliedly from the agreement and understanding of the parties — everything within the view and intention of the parties when they enter into their contract. It is always and necessarily an implied part of the undertaking of the parties to a contract that the substance or obligation of that contract shall not be increased nor diminished nor impaired in any degree without their mutual assent, for that would be to create a new contract between them to which they have not agreed.

Directly opposed to this are the mere matters of remedy, which do not arise until a remedy is sought to enforce the contract after breach, and which were not within the contemplation of the parties when they contracted.

The latter questions are always controlled by the *lex fori*, the former by the proper law governing the contract — *lex loci contractus*.

After a contract is made, any requirement that the promisor should do more than he had originally agreed to perform increases the obligation of the contract, while the obligation is diminished or impaired by any requirement that he should do less than he originally agreed to perform, or which deprives the promisee of the power to enforce performance in accordance with the original intention of the parties, expressed or implied.

From these elementary principles may be deduced the criterion by which to ascertain whether a particular inquiry relates to the substance of the contract or to the remedy merely.

Since, as has been shown, it is always an implied part of the parties' undertaking that the obligation of their contract shall neither be increased nor impaired without their mutual assent, and since the *lex fori* controls only if the point to which the *lex fori* relates is a matter of remedy, not of obligation, the criterion given below follows as a logical corollary.

CRITERION.

Suppose the legislature of the *locus contractus* to enact the law of the forum, making it applicable to the existing contract. If the result is that the obligation of the contract is either increased or impaired thereby, then the point to which the law of the forum relates is part of the obligation or substance of the contract, and is not merely a matter of remedy, and the *lex loci*, not the *lex fori*, should control. If, on the other hand, the result is that the obligation of the contract is not at all affected, being neither increased nor diminished, then the inquiry relates to a matter of remedy only, and the *lex fori* should govern.

APPLICATION OF CRITERION.

We shall omit from our consideration all those cases where the validity of the contract is called in question by either law, though it would be easy to show by the application of this criterion that if the contract is void either by the proper law of the contract or by the law of the forum, the question as to its validity can never be regarded as a matter of remedy, but is always matter of substance, since the retrospective enactment in the *locus contractus* of a law identical with the *lex fori* must always, in such a case, either increase or diminish the promisor's obligation. It is proposed here to discuss only those cases where the validity of the contract is unquestioned.

There are numerous instances in which the courts have experienced great difficulty in deciding questions of this sort, which might for the most part have been determined readily enough if this test had been employed.

In Ruhe *v.* Buck,[1] the Missouri court was divided upon the ques-

[1] 124 Mo. 178, 25 L. R. A. 178.

tion whether a law of the forum related to the remedy or to the obligation of the contract in suit. The contract (to pay money) was made in Dakota by a married woman, and was payable there. The Dakota law permitted her to contract and to sue and be sued as if she were unmarried. She owned land in Missouri which the Dakota creditor sought to attach. By the law of Missouri (*lex fori*) a married woman (for the purposes of this case) was competent to be sued personally, but her property could not be attached. The question was whether the particular remedy of attachment related to the obligation of the contract (to be governed by Dakota law) or to the remedy merely (in which case the law of Missouri would control).

The majority of the court decided in favor of the Missouri law, but there was a strong dissenting opinion. The application of our formula would show the decision of the majority to be correct. For suppose the Dakota legislature, after the contract was made, had passed a law similar to that of Missouri, making it applicable to the contract, that is to say, had deprived the creditor of his right to attach the debtor's property, leaving his other remedies against her untouched, this would neither have impaired nor increased the obligation of her contract.

In Baxter Nat. Bank *v.* Talbot,[2] an action was brought in Massachusetts against the indorser of a note, indorsed in Vermont to the plaintiff, and payable there. At the time of the indorsement there had been an *oral* agreement between the indorser and the indorsee (the plaintiff) that the former should be liable upon the indorsement only to the extent of a certain fund in his hands. By the law of Massachusetts (*lex fori*) evidence could not be introduced of this contemporaneous oral agreement to alter the absolute liability imposed by the indorsement. By the law of Vermont (where the indorsement was made and the note payable) a contract of indorsement was not absolute, but dependent upon the understanding of the parties, which might be proved by parol. It was insisted that this was a matter of evidence and remedy, to be controlled by the law of the forum, but the court held it to be part of the indorser's obligation, to be governed by the law of Vermont.

According to the test above laid down, this case was rightly decided. For if the Vermont legislature, after this indorsement had been made, had passed a law identical with that of Massachusetts,

[1] 154 Mass. 213, 28 N. E. Rep. 163.

depriving the indorser of the right to show that his liability was *limited only*, the obligation of his contract would thereby be increased, that is, he would be bound to pay the face value of the note instead of merely the amount of the fund in his hands.

Another example may be found in Downer *v.* Chesebrough.[1] In that case an action was brought in Connecticut against the indorser of a note, made and payable in New York, and there indorsed. It had been orally agreed between the indorser and indorsee that the indorsement was only for collection. By the New York law evidence of this agreement was not admissible. By the law of Connecticut (*lex fori*) it was. The court enforced the law of Connecticut. Applying our test, let us suppose the New York legislature to pass a law, subsequent to the contract of indorsement, similar to the Connecticut rule, permitting the indorser to show the understanding under which the indorsement was made, namely, that it was merely for collection. This would neither increase nor diminish the obligation of the indorser, but would simply show what that obligation was.

So in Hoadley *v.* Transportation Company.[2] In that case an engine had been consigned to the defendant at Chicago for transportation to Lawrence, Massachusetts, but was destroyed by fire in the depot at Chicago through no fault of the defendant. The defendant had given a receipt excepting liability for loss by fire while in depot or in transit. By the law of Illinois, where the receipt was given, the mere acceptance thereof did not import assent to its conditions, without affirmative evidence of such assent; by Massachusetts law it did. The trial court held this to be matter of substance, to be governed by the Illinois law, but the appellate court reversed the decision, and followed the law of Massachusetts.

This is substantially like the last case, and upon an application of the test it will be seen that if the Illinois legislature had retroactively applied the law of Massachusetts to the contract, it would neither have increased nor impaired the real obligation, but would merely have determined what that obligation was.

In the recent case of Atwood *v.* Walker,[3] action was brought in Massachusetts upon a contract made in New York to convey land situated in Massachusetts. It was held that the measure of damages for the breach of the contract was a part of the obligation of the

[1] 36 Conn. 39, 4 Am. Rep. 29.

[2] 115 Mass. 304.

[3] 61 N. E. Rep. 58 (Mass.). See also Dike *v.* R. R. Co., 45 N. Y. 113.

contract, to be determined by the law of New York, — not a mere matter of remedy, to be controlled by the *lex fori*. An application of our criterion would seem to work out the same result. For there can be little doubt that if the legislature of New York had passed a retroactive statute altering the measure of damages so as to require the promisor to pay less damages than he would have been obliged to pay under the original law, the obligation of the contract would have been thereby impaired; and if, under the new law, he should be obliged to pay more, his obligation would be increased.[1]

In Succession of Cassidy,[2] Henry Cassidy sold in Louisiana certain lands situated in Texas, with covenants of general warranty, to Horace Cassidy, who sold them in Texas with like covenants to the plaintiffs, who, having been evicted by title paramount, sued the estate of Henry Cassidy in Louisiana upon his general warranty. By the law of Louisiana (*lex fori*) suit could be brought upon such covenants only against the immediate grantor, bringing in remote vendors as parties. In Texas, the common law prevailed, by which an action for breach of covenant of title could be brought against any grantor in the chain of title. Upon the first hearing, the court decided that the question whether Henry Cassidy could be sued by a remote grantee was simply a matter of remedy. But upon a rehearing, it was held that it was part of the substance of the covenant. For if the Texas legislature had, after his conveyance, made him liable only to his immediate grantee, it would have diminished his obligation.

In Garr *v.* Stokes,[3] the defendant had made a contract in New York, by the law of which state he was not liable to civil arrest. Suit was brought in New Jersey, where he was proceeded against upon a *capias ad respondendum*. The defendant urged the law of New York, where the contract was made, as exempting him from civil arrest. But the court held that the New Jersey law (*lex fori*) should control, since it was a matter of remedy.

According to our formula, this case was correctly decided. For if the New York legislature, after the contract was made,

[1] Whether the last proposition is strictly true may depend upon the vexed question whether a promisor has the right to break his promise upon the payment of damages, or whether he merely has the power to do so. It is at least doubtful.

[2] 40 La. Ann. 827, 5 So. Rep. 292.

[3] 16 N. J. Law 404, 405. See also Wood *v.* Malin, 10 N. J. Law 208; Bullock *v.* Bullock, 51 N. J. Eq. 444, 27 Atl. Rep. 435, 438; De la Vega *v.* Vianna, 1 Barn. & Ad. 284, 20 E. C. L. 387.

had authorized an arrest to bring the defendant into court, such an enactment would neither have increased nor impaired the obligation of the contract.

So also in case of a *capias ad satisfaciendum*. Thus in Woodbridge *v.* Wright,[1] the question was whether upon a judgment for the plaintiff in Connecticut for goods sold and delivered in New York to the defendant, who was afterwards discharged from imprisonment in New York under its insolvent laws, the execution should issue against the body of the defendent or against his goods and estate only. The court held that the execution should go against body as well as estate, in accordance with the law of Connecticut.

In Melan *v.* Fitz-James,[2] a bond was executed in France and sued on in England. The bond was understood, according to the law of France, to bind the property only, and not the person of the obligor. The defendant was arrested, according to English law, upon a *capias ad respondendum*, and applied for his discharge upon the ground that the law of France, where his contract was made, gave no such personal remedy, but only a remedy *in rem*. Upon this state of facts the court held that the inquiry related to the obligation of the contract and that the French law should govern.

If, after the contract (binding the property only) was made, the law of France had been altered so as to give a personal remedy, such as arrest, against the obligor, it would have increased the obligation of the contract, for it would have transformed what was previously an obligation *in rem* only into an obligation *in personam* as well as *in rem*.

So, the ordinary statute of limitations (prescribing that after so many years no action shall be brought), when pleaded in defense of an action upon a contract, is justly held to be a matter of remedy only, to be governed by the *lex fori*, and that, too, whether the period prescribed by the *lex fori* be shorter or longer than that prescribed by the *lex loci*.[3] For (applying our test) a retrospective statute enacted in the *locus contractus*, either increasing or diminishing the period within which a suit may be

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[1] 3 Conn. 523.

[2] 1 Bos. & Pul. 138.

[3] Story, Confl. L. §§ 576 *et seq.* Bank *v.* Donnally, 8 Pet. 361; Pritchard *v.* Norton, 106 U. S. 124, 130; Great Western Tel. Co. *v.* Purdy, 162 U. S. 329, 339; Johnston *v.* R. R. Co., 50 Fed. Rep. 886; Burgett *v.* Williford, 56 Ark. 187, 19 S. W. Rep. 750; Obear *v.* Bank, 97 Ga. 587, 33 L. R. A. 384.

brought upon a contract, would neither increase nor impair the obligation of the contract, provided a reasonable period is permitted the promisee within which to enforce his claim.[1]

With respect to the point under discussion, cases involving the negotiability of notes have sometimes given rise to doubt as to the law which should properly govern.

Suppose a note, made and payable in New York, where it is negotiable, and suit brought thereon by the holder against the maker in Virginia, where no note is negotiable which is not payable at a banker's office in Virginia. The maker pleads a set-off against the payee. Is the set-off a good defense? In other words, should the Virginia court apply the law of New York or the law of Virginia?

The result reached by the application of our test is that it would be a matter of obligation, not of remedy, to be determined by the law of New York. For if, after the transfer of the note, the New York legislature should permit the maker thereof to plead equities arising between himself and the payee, it would impair the obligation of the maker to the holder. The actual decisions have reached the same conclusion.[2]

But if we suppose the case reversed, and the note to be non-negotiable in New York, but negotiable in Virginia (the forum), and suppose further that the New York legislature retrospectively takes away the right of the maker to plead set-off against the holder, such an enactment would neither increase nor impair the maker's obligation. It would merely require him to prosecute his claim against the payee in a separate action. According to our criterion therefore this would be a matter of remedy only, to be controlled by the law of Virginia (*lex fori*) and the set-off could not be pleaded. The weight of authority, it may be stated, is in favor of this view.[3]

Cases involving the statute of frauds have also sometimes caused the courts much trouble.

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[1] Koshkonong *v.* Burton, 104 U. S. 668; Wheeler *v.* Jackson, 137 U. S. 245; Ludwig *v.* Stewart, 32 Mich. 27; Hart *v.* Bostwick, 14 Fla. 162.

[2] Pritchard *v.* Norton, 106 U. S. 124, 133; Wilson *v.* Lazier, 11 Gratt. (Va.) 477, 482; Stevens *v.* Gregg, 89 Ky. 461, 12 S. W. Rep. 775, 776; Harrison *v.* Edwards, 12 Vt. 648, 36 Am. Dec. 364.

[3] Pritchard *v.* Norton, 106 U. S. 124, 133; Midland Co. *v.* Broat, 50 Minn. 562, 52 N. W. Rep. 972, 973; Bank *v.* Trimble, 6 B. Mon. (Ky.) 599. But see *contra*, Vermont Bank *v.* Porter, 5 Day (Conn.) 316, 5 Am. Dec. 157. See also Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312, 317.

If, for instance, an oral contract is made and is to be performed in Virginia, whose law provides that *no action shall be brought* upon such a contract unless it be in writing, and suit is brought thereon in Maryland, whose law does not require it to be in writing, a question at once arises whether the action will lie in Maryland. The answer depends upon whether the inquiry is a matter of obligation or of remedy.

Applying our test, since a retroactive law passed in Virginia, permitting an action to be brought on the oral contract could neither impair nor increase the obligation of the promisor, the question is one of remedy, not of obligation, and the law of Maryland (*lex fori*) would control. This conclusion agrees with the weight of authority.[1]

If the above case be reversed, and we suppose the oral contract to be made and to be performed in Maryland, while the suit is brought in Virginia, an application of our test shows that the inquiry should then be regarded as pertaining to the obligation of the contract, not to the remedy. For if the legislature of Maryland should retroactively provide that no action should be brought upon the oral contract, it would undoubtedly *impair* the obligation of the contract. Many of the decisions favor this view,[2] but about as many hold the opposite, namely, that it is a matter of remedy.[3]

The English case of Leroux *v.* Brown[4] is the leading case taking the latter view. The facts were that an action was brought in England upon an oral contract made in France, which was not to be performed within one year. The English statute of frauds provided that no action should be brought upon such a contract unless it were in writing. The law of France contained no such provision. The court held that the action would not lie in England, on the ground that it was a matter of remedy, to be governed by English law. It should be observed, however, as to this decision,

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[1] See Downer *v.* Chesebrough, 36 Conn. 39, 4 Am. Rep. 29; Wolf *v.* Burke, 18 Col. 264, 32 Pac. Rep. 427. The last case is one wherein the contract in suit was *void* under the statute of frauds of the forum, and therefore does not come within the scope of our discussion, but the opinion is instructive. But see *contra*, Cochran *v.* Ward, 5 Ind. App. 89, 29 N. E. Rep. 795.

[2] Baxter Nat. Bank *v.* Talbot, 154 Mass. 213, 28 N. E. Rep. 163; Miller *v.* Wilson, 146 Ill. 523, 34 N. E. Rep. 1111, 1112; Cochran *v.* Ward, 5 Ind. App. 89, 29 N. E. Rep. 795.

[3] Leroux *v.* Brown, 14 Eng. L. & Eq. 247, 74 E. C. L. 800; Wolf *v.* Burke, 18 Col. 264, 32 Pac. Rep. 427; Downer *v.* Chesebrough, 36 Conn. 39, 4 Am. Rep. 29; Hall *v.* Cordell, 142 U. S. 116.

[4] 14 Eng. L. & Eq. 247, 74 E. C. L. 800.

that the attention of the court was in large measure directed to the question whether the statute of frauds *invalidated* the oral contract or merely suspended the remedy. The decision goes in the main upon the theory that nothing is part of the substance of a contract unless it relates to the *validity* thereof.

There is still another class of cases that has given the courts great difficulty, namely, those (usually garnishment cases) involving exemptions of wages, etc.

A citizen of Virginia, employed (we will suppose) by a railroad company, there contracts a debt. Wages are due to the debtor from the railroad company. The creditor attaches the wages due the debtor and garnishes the company in North Carolina. The debtor claims his wages as exempt under the law of Virginia. The North Carolina law exempts wages of those laborers only who are citizens of North Carolina (as is usually the case with such exemption laws) or permits a *less* exemption than the *lex loci* or *no* exemption at all. Which law is to be applied ?

Granting that the North Carolina court has proper jurisdiction of the *res* in the attachment suit (*i. e.*, of the debt), and employing our criterion once more, it is apparent that should the Virginia legislature abolish or diminish the debtor's exemption in this case, the obligation of his contract would neither be increased nor impaired. It would be merely a matter of remedy, therefore, and the law of North Carolina should control. And this conclusion is sanctioned by the weight of authority.[1]

E converso, if a case should arise wherein the law of the forum gives a *greater* exemption than that given by the *lex loci*, it would seem that the exemption would then become part of the obligation, to be governed by the *lex loci*. For if the *lex loci* should retrospectively increase the exemptions of the debtor, the obligation of the contract would be impaired; it being well settled that a state law, operating retroactively, which increases a debtor's exemption,

[1] Mooney *v.* R. R. Co., 60 Ia. 346, 14 N. W. Rep. 343; Lyon *v.* Callopy, 87 Ia. 567, 43 Am. St. Rep. 896; Burlington, etc., R. R. Co. *v.* Thompson, 31 Kan. 180, 47 Am. Rep. 497; Stevens *v.* Brown, 20 W. Va. 450; Carson *v.* R. R. Co., 88 Tenn. 646, 17 Am St. Rep. 921; East Tenn. R. R. Co. *v.* Kennedy, 83 Ala. 462, 3 Am. St. Rep. 755; Wabash R. R. Co. *v.* Dougan, 142 Ill. 248, 34 Am. St. Rep. 74. In all these cases, the wages were not exempt at all under the law of the forum. In Morgan *v.* Neville, 74 Pa. St. 52, there was an exemption in the forum, but less than in the *locus contractus*. But see *contra*, Singer M'f'g Co. *v.* Fleming, 39 Neb. 679, 42 Am. St. Rep. 613; Drake *v.* R. R. Co., 69 Mich. 168, 13 Am St. Rep. 382. These cases hold that the exemption is a matter of obligation, and should be governed by the *lex loci*, though there be no exemption in the forum.

impairs the obligation of the contract, and is violative of the federal constitution.[1]

The cases however have not generally made this distinction between the *greater* and the *less* exemption permitted under the *lex fori*, but have either favored the law of the forum or the proper law of the creditor's contract, independently of the relative amounts of exemption provided by the two laws respectively.

In conclusion, it is to be always remembered that the state of the forum, being sovereign within its limits, has the power (if it chooses to exercise it) to substitute its own law for that of any foreign state, and wherever the intent of the legislature of the forum to do so is clearly manifested, no other course is open to the courts of that state save to obey the legislative will.

Upon this ground, Leroux *v.* Brown,[2] and other cases of like kind, may be reconciled with the principles herein laid down.

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[1] See Edwards *v.* Kearzey, 96 U. S. 595.

[2] 14 Eng. L. & Eq. 247, 74 E. C. L. 800; *supra.*